

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: LCA 51/2013

NAMRIGHTS INC.

APPELLANT

And

MERIAM NICODEMUS

1ST RESPONDENT

OFFICE OF THE LABOR COMMISSIONER

2ND RESPONDENT

LEONARD RUTAGARAMA

3RD RESPONDENT

Neutral citation: *NamRights Inc v Nicodemus* (LCA 51-2013) [2015] NALCMD 23
(02 October 2015)

Coram: MILLER AJ

Heard: 3 October 2014

Delivered: 2 October 2015

Flynote: Refugee law – Employment contract entered in contravention of the limitations imposed by Refugees Act 1999 – The effect of an employment contract arising from breach of immigration laws – Equitable considerations do not entitle the Court to

enforce a contract which a statutory enactment declares to be of no force or effect – Labour law- The court refused to allow monetary compensation granted by an arbitrator arising from an illegal contract.

ORDER

1. The third respondent's dismissal by the appellant was for a fair reason and is hereby confirmed.
2. The decision of the first respondent awarding leave and a severance package to the third respondent is hereby set aside.
3. The cross-appeal is dismissed.
4. No order as to costs.

JUDGMENT

MILLER AJ:

Introduction

[1] This appeal is against an arbitration award issued on 1 July 2013 by the first respondent ("the arbitrator"), acting under the auspices of the second respondent, in terms of which the arbitrator partly found in favour of the third respondent and partly in favour of the appellant.

[2] In terms of the arbitration award, the dismissal by the appellant of the third respondent, Mr Leonard Rutagarama, was substantively fair, but also held the third

respondent is entitled to leave days and pay severance in terms of the labour law. The arbitrator therefor ordered the appellant to pay the third respondent the sum of N\$11 136.90 on or before 15 July 2013 representing his leave days and severance pay.

[3] The appellant noted an appeal against the award, which appeal is now before this court for determination.

[4] It must be mentioned that it is not always easy to decide a matter in which legal practitioners have not made helpful submissions on a point in issue but it is a more daunting task to decide a case in which lay litigants on both sides have, without the assistance of legal practitioners, argued an appeal premised on technical legal points. This is such a case.

Factual matrix

[5] There is a plethora of detail in the papers, but the essential facts which are material to the determination of the matter are the following.

[6] By letter dated 26 April 2012, the appellant through its Executive Director and Founder, Mr Phil Ya Nangoloh informed the third respondent that he had been appointed as its Chief Administrative Officer and project officer for the implementation of a donor-funded project.

[7] On 25 February 2013, the third respondent received a letter from the appellant's Executive Director to the effect that he had been relieved of all his duties with immediate effect. The reasons for such decision which appeared in the relevant letter are as follows and I quote:

“1. Following an enquiry, it has been brought to my attention and you have also admitted to me today that you do not have a lawful work permit as required under

the laws of this country relating to certain restrictive measure imposed on aliens or relating to the employment of aliens in Namibia. Section 18 of the Namibia Refugee's (Recognition and Control) Act 1999 (Act 2 of 1999) has specific reference in this regard. I have also been advised by the office of Namibia's Commissioner of Refugee that, either you have failed to apply for such permit or that if you had applied for such a permit, your application has been unsuccessful or that it has been summarily terminated or rescinded, if it was ever granted.

2. I am also deeply concerned that your status in Namibia is not clear and or that it is still under investigation by the relevant authorities. Moreover, I am also extremely concerned by the fact that today you categorically refused to me about your exact nationality (whether you are Burundian or Rwandese) and further that you have firmly refused to hand in to me a copy of your CV.

3. In addition, I am alarmed by albeit unsubstantiated allegations that you are suspected in some quarters to be or to have been involved in certain crimes either in Rwanda or Burundi or in Namibia.

I will be happy to reconsider my decision once you produce a certified copy of your valid and lawful work permit as well as a copy of your CV."

[8] When the third respondent could not produce proof of his entitlement to work in the country, his employment with the appellant was summarily terminated.

[9] Dissatisfied with the decision of the appellant, the third respondent referred a dispute of unfair dismissal to conciliation or arbitration by way of Form LC21 dated 8 March 2013.

[10] The conciliation process bore no fruit in resolving the dispute between the parties. Consequently, a certificate of outcome to that effect was issued, which paved the way for the third respondent to refer the dispute for arbitration before the arbitrator.

[11] The arbitration was heard by the first respondent on 26 May 2013.

[12] An arbitration award was granted on 1 July 2013 wherein the third respondent's dismissal by the appellant was confirmed by the arbitrator. The arbitrator however found that the third respondent was entitled to leave days and severance and consequently ordered the appellant to pay the third respondent monetary compensation in the amount of N\$11 136.90.

[13] On 16 July 2013, the appellant, in this appeal, noted an appeal against the arbitration award issued by the arbitrator on 1 July 2013.

[14] The grounds of appeal relied upon by the appellant can be summarised as follows:

1. That the arbitrator, whilst correctly finding that the dismissal was fair, misdirected herself on the facts and law in finding that the third respondent was entitled to leave and severance pay;
2. That the arbitrator misdirected herself in finding that section 40 of the Labour Act finds application in the instance matter; and
3. That the arbitrator misdirected herself in extending the jurisdiction of the arbitration tribunal to an undocumented alien in terms of the immigration laws.
4. That the matter be referred back to the offices of the second respondent to appoint another arbitrator to determine the matter afresh.

[15] On the 18th of July 2013 the third respondent filed his notice of opposition to the appeal.

[16] On 28 August 2013, the third respondent filed a cross-appeal against the arbitrator's award and I quote:

- '1. First Respondent erred in law in finding that the Third Respondent was dismissed fairly by the Appellant;
2. First Respondent erred in law in finding that Third Respondent was only entitled to N\$ 3275.70 in lieu of severance pay;
3. First Respondent erred in law in finding that Third Respondent was only entitled to N\$ 7861.20 in lieu of annual leave days;
4. In the alternative, First Respondent erred in law by failing to order the appellant to reinstate the Third Respondent.'

[17] The appellant subsequently gave notice of its intention to oppose the cross-appeal.

Issue that falls for determination by the court

[18] The issue that falls for determination in this appeal turns on a short and narrow scope and it is this: Whether the status of Mr Rutagarama rendered the contract of employment with the appellant illegal and therefor unenforceable at law. Put differently, whether the employment contract entered between the parties was void *ab initio* and of no legal force and effect and as a result, that no benefits could be derived from an illegality arising from a breach of the laws of the country.

Analysis and evaluation

[19] Section 27 of the Immigration Control Act¹ requires non-Namibians to obtain or apply for a work permit before taking up employment or conducting any business or carrying on any profession or occupation in Namibia. Foreign nationals entering or residing in Namibia may however be exempted from the operation of section 27 of the

¹Act no. 7 of 1993.

Act.² In event that an exemption is granted, the relevant minister is empowered to impose any conditions, as he or she may deem it necessary.

[20] I think it is apposite, at this stage, to refer to the applicable legislative provisions in determining the central issue in this case.

[21] Section 18 of the Namibia Refugees (Recognition and Control) Act³ provides that subject to the provisions of this Act, every recognized refugee and every protected person in Namibia-

(a) shall be entitled to the rights conferred, and be subject to the duties imposed, by-

(i) the provisions of the UN Convention on Refugees, 1951, which are set out in Part I of the Schedule to this Act; and

(ii) the provisions of the OAU Convention on Refugees, 1969, which are set out in Part II of the Schedule to this Act, as if the references therein to refugees were references to recognized refugees and protected persons; and

(b) shall be subject to the law of Namibia.

[22] Article 2 of the United Nations Convention Relating to the Status of Refugees of 28 July 1951⁴ provides that-

‘Every refugee has duties to the country in which he or she finds himself or herself, which require in particular that he or she conforms to its laws and regulations as well as to measures taken for the maintenance of public order.’

²Section 35 of the Immigration Control Act, 1993.

³ Namibia Refugees (Recognition and Control) Act 2 of 1999.

⁴ Namibia Refugees (Recognition and Control) Act 2 of 1999 - Provisions of Conventions applicable to Recognized Refugees and Protected Persons having the force and effect of law in Namibia.

[23] Article 26 of the same Convention provides the following:

'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.'

[24] Section 24 read with section 27 of the Immigration Control Act, 1993⁵ provide that one of the prescribed conditions is that the holder of any permit issued under the Act shall not engage in any employment, work, occupation or activity for gain unless he has previously obtained a permit authorising such employment.

[25] It is convenient to deal with the arguments advanced by both parties bearing on the present issue.

[26] It was submitted on behalf of the appellant that the ground precluding the third respondent from enforcing and benefiting from the employment contract is said to be that the third respondent, took up employment without applying or obtaining a work permit. Once he took up employment with the appellant without a work permit, he breached the provisions of the immigration laws of the country.

[27] The appellant further explained its stand of its averment that, at the time the third respondent was employed by the appellant, Mr Rutagarama was in Namibia on a refugee status and was therefore not permitted to take up employment within this country without a work permit or without being granted with the exemptions provided for in terms of section 35 of the Immigration Control Act. Thus, the third respondent entered an employment contract in violation of immigration laws of the country. The appellant concluded that no court or tribunal ought to enforce an illegal contract and/or allow itself to be made an instrument of enforcing obligations arising out of the contracts or transactions which are illegal, especially if such illegality is duly brought to the notice of

⁵Immigration Control Act, Act no. 7 of 1993.

such court or tribunal by the person who is implicated in such illegality (*Jajbhay v Cassim* 1939 AD 537 and *Venter v Vosloo* 1948(1) SA 631).

[28] The third respondent's submissions are briefly the following: From the papers it is clear that the first respondent's is a recognized refugee in terms of Namibian laws and ought legally to enjoy some privileges accorded to him by the law, including favourable employment treatment and exemptions as contained in section 18 of the Namibia Refugees (Recognition and Control) Act. The third respondent further submitted that he could only be subjected to the mandatory requirement of acquiring a work permit if the contracting State had made specific reservation to the applicable convention. This was not done, so the third respondent alleges. Thus, since there was no reservation in that respect, he was not required to have a work permit before entering into an employment contract with the appellant.

[29] The third respondent further submitted that in the event that court finds that he was required to have a work permit, then an employer (appellant in the instance case) is also not allowed to employ an alien without a work permit. The third respondent therefore claims that if admitted refugees are treated similarly to aliens despite the Namibia Refugees (Recognition and Control) Act, then the appellant knowingly employed the third respondent in violation of the law. Consequently, the appellant, it is further argued is also not entitled to the relief sought as the appellant is before this court with unclean hands.

[30] I now deal with the facts that are common cause or not disputed by the parties. It is common cause that the third respondent is in Namibia on a refugee status. It is also common cause that the third respondent took up employment without obtaining a work permit or being granted an exemption in terms of the law. In addition, after being employed, the third respondent failed to apply for a work permit which would enable him to work lawfully in this country. Moreover, there is no trace of evidence before this court to show that the third respondent applied for a work permit, but his application was, in due course, refused.

[31] The above facts, rightly in my view, are material to the present inquiry and count heavily against the third respondent. In the matter of *S v Russe!*⁶, the court opined that one must not lose sight of the object of the Immigration Control Act which is, not only to regulate and control the presence of non-Namibians within the borders of the Republic, but also to reserve employment opportunities for Namibians. This is, for instance, evident from the wording of s 27 of the Act which deals with applications for employment permits. Section 27(2)(b) is couched in these terms:

'27(2) The board shall not authorise the issue of an employment permit unless the applicant satisfies the board that -

. . .

(b) the employment, business, profession, or occupation concerned is not or is not likely to be any employment, business, profession, or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia;'

[32] In light of the statutory provisions cited under paragraphs 20 to 23 of this judgment, I have no hesitation in finding that the third respondent falls within the ambit of the said provisions. Since he failed to make use of the procedures set out in the immigration laws relating to employment of foreign nationals in Namibia, I also find that his employment contract is illegal and of not force. On this premise, the arbitrator's finding on the issue of dismissal of the third respondent cannot be faulted and as a result, there was no misdirection on the part of the arbitrator.

[33] I am inclined to concur with my brother Masuku, AJ in *Kondjeni Nkandi Architects v The Namibian Airports Company Limited*,⁷ that in our system of law, equitable considerations do not entitle the Court to enforce a contract which a statutory enactment

⁶1999 NR 39 (HC).

⁷*Kondjeni Nkandi Architects v The Namibian Airports Company Limited* (I 3622/2014) [2015] NAHCMD 223 (11 September 2015, delivered on 11 September 2015).

declares is to be of no force or effect. Therefore, this court cannot sanction the payment of money to the third respondent for work done contrary to the express prohibition of the statute, inequitable as that may seem. In my view, this court should also refuse to countenance monetary compensation as issued by the arbitrator on 1 July 2013.

[34] In conclusion, having disposed of the issue at the heart of this appeal, I do not deem it necessary to deal with the remaining grounds raised by this appeal and in the result, I make the following order:

34.1 The third respondent dismissal by the appellant was for a fair reason and is hereby confirmed.

34.2 The decision of the first respondent awarding leave and severance package to the third respondent is hereby set aside.

34.3 The cross-appeal is dismissed.

34.4 No order as to costs.

PJ Miller
Acting

APPEARANCES

APPELLANT:	P. Ya Nagoloh On behalf of Namrights Inc.
3 rd RESPONDENT:	In person
1 st and 2 nd RESPONDENTS:	No appearance

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